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No. 92-1555

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1992

TIMOTHY JANSEN, DANIEL K. GOENS, ROBERT H. PRASSE, EVAN WOOD, and MARC E. MONAHAN;
and
WILLIAM NEAL, BRIAN CLEMENS, FRANK GORRASI, GREGORY HISSETT, and PHILIP S. RAMSTETTER;
and
DANIEL R. CORRY, NOAH H. GIBBS IV, TIMOTHY B. BURWICK, LAWRENCE D. CAPPEL, ROBERT HART, JEFFREY H. SWEET, MARK E. KREIMER, NICHOLAS SCHIBI, and TIMOTHY A. CUNNINGHAM,

Petitioners,

vs.

CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;
and
TILFORD YOUNGBLOOD, RALPH NICHOLS,
and
THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS (Youngblood, et al.) IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether a city may use race as a basis for preference in hiring firefighters pursuant to a remedial Consent Decree, where the facts underlying the decree demonstrate a virtual exclusion of African-Americans from the work force and where hiring based on a competitive written examination would result in disproportionate adverse impact against African-Americans.

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CITY OF CINCINNATI, SCOTT JOHNSON, CIVIL SERVICE COMMISSION, WILLIAM MILLER, and NORMAN WELLS;
and
TILFORD YOUNGBLOOD, RALPH NICHOLS,
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THE PLAINTIFF CLASS CONSISTING OF BLACK APPLICANTS FOR AND BLACK EMPLOYEES OF THE DIVISION OF FIRE OF THE CITY OF CINCINNATI,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF OF RESPONDENTS (Youngblood, *et al.*) IN OPPOSITION

Respondents, Tilford Youngblood, *et al.*, respectfully request that this Court deny the petition for a writ of certiorari for review of the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on October 13, 1992 (suggestion for rehearing *en banc* denied December 29, 1992).

STATEMENT OF THE CASE

A. INTRODUCTION

This reverse discrimination case is a collateral attack by several white applicants on a consent decree which has governed hiring and promotions of firefighters in the City of Cincinnati for a number of years. The City of Cincinnati carried out the hiring challenged by petitioners pursuant to the Consent Decree in *Youngblood v. Dalzell*, Civil No. 90-8774 (S.D. Ohio 1974).

Under the Consent Decree, the City is permitted to use a written examination as one of the components in its hiring and selection system. However, the Consent Decree prohibits the use of selection devices, including written examinations, which have a discriminatory impact on minorities.[1] In addition, the Consent Decree specifically prohibits using differences in test scores unless the written exam has been validated for that purpose in accordance with regulations of the Equal Employment Opportunity Commission. (Para. 25, Pettrs.' App. 25).

---

[1] Para. 25, Petitioners' App. 38. Under the Consent Decree, minorities are defined to consist of African-Americans.

In this case, there was unrebutted evidence before the District Court that the written examination had a disparate impact on minorities, and the City remedied this disparate impact by its affirmative action hiring. There was also undisputed evidence that the written examination had not been validated for purposes of rank order hiring.

The District Court did not reach the constitutional issue raised by petitioners. Rather, it interpreted the Consent Decree and erroneously concluded that the City's affirmative action hiring was not authorized by the Consent Decree. The Court of Appeals vacated that determination and remanded for further proceedings in light of a previous ruling in *Youngblood v. Dalzell*, 925 F.2d 954 (6th Cir. 1991). The petition for certiorari followed.

B. HIRING UNDER THE CONSENT DECREE

The *Youngblood* respondents herein commenced *Youngblood v. Dalzell* in 1973, alleging that the City was engaged in a pattern and practice of discrimination based upon race in recruiting, testing, selecting and hiring applicants for the position of fire recruit and in the promotion of firefighters in the Division of Fire. The *Youngblood* class sought vindication of their rights under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §§ 1981 and 1983. In 1973, when the action was commenced, only one-half of one percent of Cincinnati firefighters were African-Americans. *Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978). Thus, in 1973, only five of approximately 900 firefighters in the City of Cincinnati were African-Americans.

The *Youngblood* Consent Decree recognized that there was a manifest imbalance in the racial composition of the Fire Division work force. In the Consent Decree at paragraph 5, the City acknowledged that its past practices raised an inference that a pattern or practice of discrimination may have occurred. (Pettrs.' App. 32).

The parties in *Youngblood* entered into the Consent Decree with the purpose of eliminating discriminatory selection devices and achieving racial integration in the Fire Division. The first sentence of paragraph 22 of the Consent Decree states that " . . . defendant shall adopt and seek to achieve a goal of hiring sufficient numbers of qualified minority persons to achieve a work force composition which will not support any inference of racial discrimination in hiring." (Pettrs.' App. 41). Paragraph 21 of the Consent Decree provides in relevant part that the City shall not "engage in any other practice or policy which has the purpose or effect of discriminating against any minority applicant. . . . " (Pettrs.' App. 40). The City and the *Youngblood* respondents agree that the overall purpose of the Consent Decree is to eliminate discriminatory selection devices and, subject to the availability of qualified applicants, to achieve a racially integrated work force in the Fire Division. It is undisputed that the City hired only persons qualified to be firefighters.

With respect to written examinations, the Consent Decree permits written examinations to be part of the selection process if they are "content valid." (Para. 16, Pettrs.' App. 38). The Consent Decree also requires the

City to ignore differences in test scores when those differences do not predict a significant difference in job performance. In this regard, paragraph 25 of the Consent Decree states in relevant part,

> [s]cores on selection procedures which have not been validated in accordance with the EEOC guidelines or scores on validated standards which are not sufficiently different as to predict a significant difference in job performance shall not be used in determining the qualification of applicants.

One other goal of the Consent Decree was that the City achieve 18% minority representation in the Fire Division by 1980. As a result of hiring under the Consent Decree, the Fire Division was 7% minority in December of 1976; however, layoffs then reduced the percentage of African-Americans to 4.4%. *Youngblood v. Dalzell*, 568 F.2d 506, 507 (6th Cir. 1978). At the end of 1980, only 9.6% of the Fire Division personnel were black. Thus, the City fell far short of achieving 18% minority representation by 1980. The Consent Decree was modified to increase the time for the City to increase minority representation, with December 31, 1985 being the date for achieving the 18% minority representation. (Pettrs.' App. 48). The City failed to achieve this. It is undisputed that the Fire Division did not become 18% minority until 1987.

The parties to the Consent Decree agree that the overall goal of integration in the Consent Decree is separate and in addition to the 18% goal, which was never met in a timely manner. The parties also agree that the use of dual lists was authorized by the Consent Decree. Furthermore, the use of dual lists was necessary to

remedy the disparate impact resulting from the written examination used by the City in hiring in the years at issue in this case.

The petitioners in this action contend that, because their written test scores were higher than scores of some of the minorities who were hired, their rights were violated. However, the *Youngblood* respondents presented unrebutted evidence to the District Court that the written examination had a marked adverse impact on minorities. (App. 21-34).[2] The affidavit of Dr. Charles Cranny, an industrial psychologist employed by *Youngblood* respondents, demonstrated that the written examinations did have such a disparate impact, which would only be remedied by affirmative action. *Id.* Indeed, it is apparent just from the face of the eligible list that the test had an adverse disproportionate impact on minorities. Of the 115 highest scoring applicants in 1988 to 1990 on the eligible list, less than ten were African-Americans. 977 F.2d at 243. The factual record was undisputed that the written examination was not valid for hiring by test score differences. *Id.*

In spite of the existence of undisputed evidence of disparate impact, the District Court granted summary judgment for the petitioners. The Court of Appeals ruled that this was improper and reversed the grant of summary judgment.

---

[2] Paragraph 16 of the Consent Decree prohibits the City from using a written test which has a disproportionate adverse impact on minorities unless it has been validated pursuant to EEOC regulations at 29 C.F.R. § 1607.1, *et seq.*

ARGUMENT

I. REASONS FOR DENIAL OF THE WRIT OF CERTIORARI

This Court has addressed the constitutionality of affirmative action plans in a number of cases in recent years. The law in this area is well developed, and there is no reason for this Court to review this case.

When assessing the constitutionality of affirmative action plans, this Court has consistently evaluated these plans using a two part test. First, the plan must be adopted after there is sufficient evidence that remedial action is warranted. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986). Second, the plan must be narrowly tailored to achieve its purpose. *Id.* at 279. This test has been employed by this Court in varying challenges involving claims of reverse discrimination in a private employer's training program, *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); union hiring goals, *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986); layoff preferences for minorities, *Firefighters Local Union No. 1784 v. Stotts*, 476 U.S. 561 (1984); race and sex-conscious promotion provisions contained in an affirmative action plan, *United States v. Paradise*, 480 U.S. 149 (1987); *Local Number 93, International Assn. of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986); *Johnson v. Transportation Agency, Santa Clara Cty., Cal.*, 480 U.S. 616 (1987); and challenges to minority set aside plans, *City of Richmond v. Croson*, 488 U.S. 469 (1989).

Under *Martin v. Wilks*, 490 U.S. 755 (1989), the petitioners may have standing to challenge the constitutionality of the City's hiring practices, but they do not

have standing to contest whether the City's interpretation of the Consent Decree is correct.

In this case, the District Court did not reach the constitutional issues raised by petitioners. Rather, the Court ruled erroneously that the hiring goals of the Consent Decree had been met and that affirmative action could no longer be practiced. As the Court of Appeals ruled, the petitioners did not have standing under *Martin v. Wilks*, 490 U.S. 755 (1989) to challenge the parties' interpretation of the Consent Decree and urge their own view of it. The Court of Appeals evaluated the challenged practices of the City using the proper constitutional test and remanded the case for proceedings consistent with its opinion.

The adoption of the Consent Decree and the challenged hiring practices carried out under it were supported by a compelling government interest. Further, the hiring methods used by the City were narrowly tailored to meet the important goals of the Consent Decree.

This appeal does not squarely present important constitutional issues in a way to justify granting a petition for certiorari. This Court should deny the petition just as it did in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992).

II. QUESTION PRESENTED FOR REVIEW

1. WHETHER A CITY MAY USE RACE AS A BASIS FOR PREFERENCE IN HIRING FIREFIGHTERS PURSUANT TO A REMEDIAL CONSENT DECREE, WHERE THE FACTS UNDERLYING THE DECREE DEMONSTRATE A VIRTUAL EXCLUSION OF AFRICAN-AMERICANS FROM THE WORK FORCE AND WHERE HIRING BASED ON A COMPETITIVE WRITTEN EXAMINATION WOULD RESULT IN DISPROPORTIONATE ADVERSE IMPACT AGAINST AFRICAN-AMERICANS.

a. The petitioners do not have standing to enforce their own interpretation of the Decree.

Petitioners, who are not parties to the Decree, argue that the Decree does not authorize the affirmative action program that the parties had used for 15 years. The Sixth Circuit, relying on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), held that petitioners who are not parties to the consent decree lack standing to have that decree interpreted upon their own terms. *Jansen*, 977 F.2d at 242. The Court did recognize petitioners' right to challenge the constitutionality of the decree under *Martin v. Wilks*, 490 U.S. 755 (1989).

The Sixth Circuit ruling follows this Court's precedent and needs no review. The Sixth Circuit also followed its own recent decision in *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992), *cert. denied*, ___ U.S. ___ (1992) (challenge to police consent decree). Moreover, this Court's decision in *Martin, supra*, has been overridden by Section 108 of the Civil Rights Act of 1991, so future

decisions affecting the rights of nonparties to decrees will be made in light of the Act. This Court should not accept a case now on an issue that is unlikely to recur.

Regardless of the Civil Rights Act, the issue of petitioners' right as nonparties to the Decree to impose their interpretation of the Decree on the parties should be permitted to "percolate" within the federal and state courts to allow a consensus to emerge. Petitioners cite no other case law that discusses this issue.

Finally, petitioners' interpretation of the Consent Decree is simply in error. Petitioners' arguments are addressed by the Court of Appeals in Part IIB of its opinion. Quite simply, the Consent Decree authorizes the City to employ affirmative action to mitigate the discriminatory impact of written examinations which have not been validated for ranking applicants by differences in passing scores. Certainly, this Court should not entertain a debate about the meaning of the Consent Decree's terms at this late date in its history.

b. The City's use of affirmative action was justified by its compelling interest in remedying discrimination in the Fire Division.

Contrary to petitioners' arguments, an actual finding of discrimination is not a prerequisite to affirmative action in hiring. In the case of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), Justice O'Connor, concurring in the judgment, harmonized the various positions taken by the Justices to describe this Court's test for judging the constitutionality of race conscious affirmative action plans. The first part of the two part test concerned

the factual basis, and in this regard Justice O'Connor said:

> [T]he Court is in agreement that [the] . . . remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that remedial action is required.

Wygant, supra, 476 U.S. at 289. The *Wygant* decision stands for the proposition that evidence of statistical disparity "sufficient to support a prima facie Title VII pattern or practice claim" justifies affirmative action in employment. *Id.* at 292 (O'Connor, J., concurring).

This Court returned to this issue in *City of Richmond v. Croson*, 488 U.S. 469 (1989), where the 30% minority set aside program for city contractors was struck down. In a majority opinion drafted by Justice O'Connor, the Court again reaffirmed that a governmental body could practice affirmative action without a specific finding of discrimination from a court. The Court noted that, "[w]here gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern and practice of discrimination." *Id.*, 488 U.S. 469 at 497 (quoting *Hazelwood School District v. United States*, 433 U.S. 299, 307-08 (1977)).

In the instant case, the necessary factual predicate exists. When the Consent Decree was signed, less than one-half of one percent of the City's Fire Division was African-American. *Youngblood v. Dalzell*, 568 F.2d 506, 508 (6th Cir. 1978). There is no real debate that the virtual exclusion of minorities – five of 900 firefighters were black – gave rise to a prima facie case.

When the challenged hiring took place in 1988-1990, the City used a written examination which had a severe disproportionate impact on African-Americans. (App. 21-34). The petitioners presented no evidence to dispute the findings of respondents' industrial psychologist in this regard. Moreover, even if one assumes the written examination was valid to judge qualification on a pass/fail basis, there was no evidence to support the claim that higher test scores meant a better qualified applicant among those who passed. The respondents' expert found that the test was not valid for hiring by rank order, and this point was undisputed. Further, respondents' expert's opinion was corroborated by the City's personnel division, both in answers to interrogatories (App. 6 and 7) and in deposition testimony (App. 10, 16, 17, and 18). As the Court of Appeals recognized, "no evidence has been presented to indicate that the scores which result 'predict a significant difference in job performance.' " 977 F.2d at 243.

Quite simply, the petitioners are asking this Court to ignore the factual record and assume that a higher test score means a more highly qualified applicant. The factual record shows the opposite. If hiring had been done pursuant to test score, the City would have violated Title VII. The record supporting the Consent Decree in this action is precisely what this Court's decisions in *Wygant* and *Croson* hold to justify affirmative action in hiring.

c. The City's hiring actions were narrowly tailored to remedy the manifest racial imbalance in the Fire Division.

Once the required factual basis exists, a remedial plan must fit the problem to be addressed. As Justice O'Connor stated in *Wygant*, 476 U.S. 287:

> Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and adversely affected by a plan's racial preference.

In *Wygant*, this Court noted that the burden on innocent white workers was greater in the context of layoffs than it is in the context of *hiring*. The Court in *Wygant* expressly approved of hiring goals:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job . . .
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individual . . . [T]he Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive

> means of accomplishing similar purposes – *such as the adoption of hiring goals* – are available.

476 U.S. at 283 (emphasis added).

The petitioners did not meet their burden to show that the City's hiring practices were unnecessary and overbroad. *Wygant*, 476 U.S. at 277-78, 293.

It is important to recognize that only qualified applicants were hired. The Consent Decree provides that only qualified persons may be hired. Paragraph 25 states in relevant part that "[i]n no event shall the Division of Fire be required to hire a person as a fire recruit who is not qualified." There is no evidence anyone hired was unqualified.

The hiring goals in the instant case are narrowly tailored and not based upon general population statistics. In *Local 28 of the Sheet Metal Workers' International Association v. EEOC*, 478 U.S. 421 (1986), this Court approved a court order setting a 29% goal which was based upon the percentage of nonwhites in the labor pool. In the instant case, the undisputed evidence indicates the relevant labor pool to be those qualified to take the written exam. *See Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (use of applicant flow data indicates qualified labor pool). Accordingly, the labor pool was approximately 40 percent African-American. (App. 29, 32). So the City's use of a 40 percent goal for minority hiring was appropriate.

In *Sheet Metal Workers v. EEOC, supra*, this Court stated that the 29% goal did not impose an undue burden on whites:

> While whites seeking admission into the union may be denied benefits extended to their non-white counterparts, the court's orders do not stand as an absolute bar to such individuals; indeed a majority of new union members have been white.

Id. at 479.

In the instant case, petitioners had no reasonable expectation that hiring would be based solely on written test scores. Moreover, far from being excluded from employment, at most their employment opportunities have only been delayed. At least nine of the petitioners have already been hired as Cincinnati firefighters in subsequent hiring rounds.

Had the City done as petitioners suggest and wrongly assumed that small differences in written test scores proved a meaningful difference in qualification and hired by strict rank order of test score, almost no African-Americans would have been hired in the hiring rounds at issue in this case. In using separate lists for blacks and whites pursuant to the Consent Decree in *Youngblood v. Dalzell*, the City avoided a prima facie violation of federal civil rights laws.

CONCLUSION

The record in this case does not support the petitioners' formulation of the question presented for review. The Court of Appeals properly applied precedent in reaching its decision. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, *et al.*,	:	Civil Action No. C-1-90-134
Plaintiffs,	:	Judge Rubin Magistrate Sherman
vs.	:	RESPONSE TO INTERVENORS' INTERROGATORIES TO CITY DEFENDANTS AND REQUEST FOR PRODUCTION OF DOCUMENTS
CITY OF CINCINNATI, *et al.*,	:	
Defendants.	:	
	:	

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, the intervenors submit these interrogatories to be answered by the defendants within thirty (30) days of service.

These interrogatories inquire as to all information in the possession, custody, control or within the knowledge of defendants and their present and former representatives, agents, and employees, including their attorneys of record in the instant litigation, and all other persons or entities acting on behalf of the defendants.

* * *

2. With regard to the examinations identified in response to Interrogatory 1, identify all documents which pertain to their validation within the meaning of the Equal Employment Opportunity Commission's (EEOC's) Uniform Guidelines.

The test company has validated the exams nationally and a transportability study was conducted locally.

3. Have defendants ever attempted to assess the impact of the examination procedures referred to in answer to Interrogatory 1 for permanent appointment to the positions with the Division upon black persons, and if so, describe in detail what was discovered, including, in particular, any information or data with respect to:

a. Whether such examinations and examination procedures discourage black persons from applying for such positions;

No study had been conducted in this area. However, the large numbers of minority candidates who sit for the written exam seems to indicate that they are not discouraged by the written test. It should also be noted that at the time of sign-up, candidates are supplied with information on the entire selection process. It is impossible to know if the applicants who fail to appear for the written test are discouraged by other parts of the selection process.

b. Whether such examinations and examination procedures are culturally biased in the sense that black persons are likely to do less well than white persons because of their different cultural and educational backgrounds;

No study has been conducted. There is some adverse impact on the written exam. However, the Consent Decree and the use of separate lists for majority and minority candidates alleviates the adverse impact.

c. The relative success black persons have achieved on said examinations as compared to white persons and reasons for any such differences;

No study had been conducted. The results of the exams indicate some disparate impact on the written test.

d. Identify all persons who performed such assessment or know the results; and

No assessment has been performed.

e. Identify all documents which pertain to all such assessments.

N/A.

4. Do the defendants contend that any of the examinations referred to in Interrogatory 1 have been determined to be valid by an empirical (criterion-related) validity study, and if so, do the defendants contend that such validity has been established in accordance with the Equal Employment Opportunity Commission (EEOC) Guidelines on Employee Selection Procedure? Identify all documents upon which this answer is based.

The examination is content valid, not criterion valid.

5. Have defendants determined whether persons who scored higher on the written examination administered in the 1987-89 hiring process can be expected to or actually perform better on the job?

No study has been performed by the Personnel Department.

6. What difference, if any, in scores on the written examination administered in the 1987-89 hiring process

are predictive of a significant difference in job performance as a Cincinnati firefighter?

Since the selection process consists of several components in addition to the written test (i.e. physical ability, medical, background/polygraph and more recently a psychological), it would be impossible to ascertain whether the written test alone is predictive of a significant difference in the job performance of a firefighter.

Additionally, the written test is designed to determine skills and knowledge at entry level. A 13 week training program is given to all Recruits to train them in all aspects of job performance.

App. 5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TIMOTHY JANSEN, ET AL,	:	Civil Action
Plaintiffs,	:	C-1-89-079
vs.	:	
CITY OF CINCINNATI, ET AL,	:	
Defendants.	:	

The deposition of CAROL CALLAHAN, Witness herein, taken as on Cross Examination by the Plaintiff, pursuant to the Federal Rules of Civil Procedure, and notice issued to take deposition at the offices of the City Solicitor, Room 214 City Hall, Cincinnati, Ohio 45202 on Monday, December 17, 1990, at 2:00 p.m., before Vera L. Draper, a court reporter and Notary Public.

* * *

[p. 5] Q. I want to expand a bit on your answers to the intervenors, and we don't have to – Well, we can mark it. Let's mark this as Callahan Deposition Exhibit No. 1.

(Callahan Exhibit No. 1 was marked for identification.)

MR. WYLER: Were you referring to the ones August 10th, 1990?

MR. SCHRIDER: Yes, the answers.

Q. Let's take a took at those, Miss Callahan. Let's go to your answer to No. 3 which is on pages 5 and 6. Now do you see at the bottom where it starts 3-B and you are being asked to state whether the examination and examination procedures are culturally biased on the sense that black persons are likely to do less well than white persons because of their different cultural and educational background. You see that? And the answer was, "No study has been conducted."

Let me stop there for a second. In answering these interrogatories, I take it that your answer went to both the 1988 and the 1989 exam; is that correct?

A. Right.

MR. WYLER: At this point I would like to impose an objection to this line [p. 6] of questioning as immateral to the entire issue before the court in this case. Go ahead.

Q. Let me proceed with my irrelevant question, if I might. Your answer went to both the 1988 and 1989 exam, is that right; both sets of exams? Take a minute if you need to.

A. Yes. Yes, it did.

Q. And you go on to say, "There is some adverse impact on the written exam." That is true from the 1988 exam; right?

A. Right.

Q. And that is also true from the 1989 exam, isn't it?

A. Right.

Q. And at least with respect to the '88 exam, I'm going to show you what has been marked as Callahan deposition Exhibit No. 2.

(Callahan Exhibit No. 2 was marked for identification.)

Q. Do you recognize this?

A. This looks like that material that came from Dr. Cranny.

Q. Right. And you saw this in connection with the Youngblood deposition, didn't you – litigation, didn't you?

[p. 7] A. Right.

Q. You had a chance to check his calculations where he determines that at least with respect to the 1988 exam the four-fifths rule is missed by quite a bit; right?

MR. WYLER: Objection. Proper foundation.

A. I believe that we did not agree with this, I would have to go back and look but I thought that we did make changes on his figures.

Q. Well, we will check that. So let's at least find out what we do agree with. There is adverse impact on the '88 exam, maybe not as much as Craney says; is that right?

MR. WYLER: Objection.

A. Minorities did less well if that's what you are asking me, yes, absolutely.

Q. What is the difference between that and saying there is adverse impact?

MR. VOLLMAN: I think the adverse impact, I don't know whether it has an ordinary meaning or legal meaning, I think we should clarify that.

A. Well, since we have a consent decree and we always do 40 percent, I don't see that the [p. 8] process has adverse impact.

Q. I am speaking only of the test results.

A. The written test?

Q. That's correct. So confining our discussion to the written test, you would agree that the written test results demonstrated adverse impact?

MR WYLER: Objection.

A. Yes.

Q. Now again you would agree with that with respect to the '89 written test results as well; right?

A. That minorities did less well than majorities? Yes.

MR WYLER: Ongoing objection. Go ahead.

Q. Now you just – with respect to your statement about the consent decree, the City uses two lists, a majority list and a minority list; right?

A. Right.

Q. And from those two lists it selects the fire recruits; isn't that right?

A. That is correct.

Q. Now each of the written, all of the results from the written tests end up getting ranked by [p. 9] – all the

white or majority people are ranked by the order of their test score, and all the minority people are ranked by their test score?

A. Correct.

Q. If you didn't have the decree you would rank everyone in order of their test score, blending majority and minority people?

A. Correct.

Q. Now the City has been in litigation with various parties about the fire recruit process and the City has taken the position that certain parts of its selection process are validated; right?

A. Right.

Q. But this validation of the various tests applies to the written test, and applies to it with respect to whether people pass or fail the written test; isn't that right?

MR WYLER: Objection. For the purposes of clarification, my objection is an ongoing one to validation issues in this lawsuit. Go ahead.

Q. Let me rephrase it if I might.

When you rank people after they get their test scores, in these tests the person ranked No. [p. 10] 3 is no more qualified to be a firefighter by virtue of that score than the person ranked No. 10; right?

MR WYLER: Objection to the form of the question.

A. Between 3 and 10, probably not.

Q. And certainly the City has not done a test or a study to determine whether the ranking of a person in the third slot is predictive of better job performance than the person ranked in the 10th slot?

A. No, they have not done a study like that.

Q. Whatever validation studies the City has done or hired people to do don't address ranking people by test score, do they?

A. We don't address, the validation does not address ranking particularly, and there is always a standard measure of error on any kind of test procedure, between 3 and 10. I would say what you are saying is true, but between 3 and 110, I would say it does reasonably infer that the person with 3 is better qualified than 103.

Q. But your validation study doesn't approach the process that way, does it; doesn't approach it as a validating ranked series of test scores?

[p. 11] A. I believe the validation from the test company does.

Q. Well, let's talk about that. With respect to the 1988 validation study, or the 1988 test you have, you claim that there was a validation study?

A. Yes.

Q. Do you have it? Do you have the validation study?

A. The transportability study that we did, or the company's?

Q. Either.

A. I have ordered another one. I heard John say you didn't have it so I ordered another copy.

Q. So we don't have that here right now, but you ordered one?

A. Right.

Q. Was, with respect to the 1988 test, was there an additional study to determine whether the national test fit the Cincinnati Fire Department?

A. Yes.

Q. And where is that?

A. That is the transportability study.

Q. And did you bring one of these with you?

A. It is attached.

[p. 12] Q. Is that the same as this one?

A. Yes.

Q. You gave a different type of test in 1989 than you did in 1988?

A. No, not a different type but a different test.

Q. A different test would be subject to a different validity study?

A. No, not necessarily. What you are looking at are the minimum qualifications you need at entry level, which turn out to be on practically every test that is on the market today; test reading comprehension, basic math

skills and some kind of mechanical reasoning. The test we got in 1988 was exactly that same kind of these. It was from a different test company. The reason we got it is because we wanted to have a little bit different questions because the one from MEAS is the same questions over and over again. We wanted to have that people weren't memorizing what they had from the time before, but the validity study even for MEAS could apply to the 1988 test because what it is showing you is that these are the basic skills you need. We do not test for actual skills that you need to be a firefighter, we are just looking to see if you have the [p. 13] minimum skills to be trained as a firefighter.

Q. Let me show you what we will mark as Callahan Deposition Exhibit No. 3.

(Callahan Exhibits Nos. 3 and 4 were marked for identification.)

MR. WYLER: At this point I will say we have not been sent a copy of that and have not seen it.

Q. Do you recognize what has been marked as Callahan Deposition Exhibit No. 3?

A. Yes.

Q. Can you tell us what that is?

A. It is the MEAS validation study.

Q. And what does that mean?

A. It is a study they did nationally on what the basic qualifications are that you need for entry level firefighting.

Q. And what year did you give a test that was validated by this MEAS validation study?

A. I believe the first one we gave was in 1983 or '84.

Q. And then between '88 and '89 it was the '89 test that related to this study; is that correct?

[p. 14] A. We have used MEAS every year except '88.

Q. I'm going to show you now what has been marked as Callahan Deposition Exhibit No. 4, and tell us what that is.

A. This is – that is a transportability study where we talk to our own firefighters and say, when you come in what are the knowledge and skills and abilities that you need to help you pass the academy and to be a successful firefighter.

MR. WYLER: We also have not been provided with a copy of that document.

Q. And when was this transportability study prepared?

A. I believe that was in 1983, '84. I did not do this myself, this was done by another analyst in our office.

Q. So this is from '83 and '84?

A. Uh-huh.

MR. VOLLMAN: Bates stamped November 8, 1983.

MR. SCHRIDER: That is on the first long page.

MR. VOLLMAN: Right.

[p. 15] Q. So it is your contention that the transportability study done for the MEAS exam also demonstrates validity with respect to the 1988 test; is that correct?

A. Right.

Q. And what company, what national test was the 1988 test?

A. Cooperative Personnel Services.

Q. Then in order to determine the accuracy of your statement, we would have too look at the Cooperative Personnel Services validity study?

A. We will get that for you.

Q. And see if they say they are measuring the same things that you have identified to be those basic skills necessary in Cincinnati to be trained as a fire recruit; is that right?

A. Uh-huh.

Q. So we can't really get that answer today?

A. I can even get you a copy of the test, they are so similar. They are very basic tests on the reading, math and mechanical reasoning.

Q. In terms of the validity study, we will get that as soon as you get it?

A. Right.

[p. 16] Q. Where in the MEAS validity study does it show that the test may be valid for the purpose of ranking people by their written test scores?

A. I would have to go through it, I haven't looked at it in quite a while.

Q. You are not really sure it approaches it from that angle?

A. No validity study is going to say if you got number one right and I didn't, that you're smarter than me, but certainly the inference is that the more you get right the better qualified you are. And that is not when there are small differences, but certainly as we said if you are ranked No. 3 and No. 103, you did substantially better, but basically I agree with you that if you're talking 3 and 10, what we are looking for are the minimum qualifications we are not worried about rank because we had the consent decree.

Q. Well, certainly from the City's perspective, every one who scores above passing is qualified to receive training; isn't that right?

A. Yes.

MR. WYLER: Objection

Q. So the City doesn't feel that it is hiring a less qualified firefighter when it hires from [p. 17] the minority list as opposed to the majority list?

MR. WYLER: Objection

Q. Everyone is minimally qualified; right?

A. Right. This is only one small component of a very long process, the written test.

Q. Now in your response to 3-C of the interrogatories which were marked as Callahan Deposition Exhibit

No. 1 on page 6, you were asked whether the City has tested or determined the relative success black persons have achieved on said examination as compared to white persons, and reasons for any such differences. And the answer was that, "No study has been conducted. The results of the exams indicate some disparate impact on the written test"; is that correct?

MR. WYLER: Standing objection to this line of questioning.

Q. That was the answer; right?

A. Right.

Q. Now this answer, like the others, apply to both the 1988 exam; right?

A. Right.

Q. And the 1989 exam?

A. Right.

Q. Is that correct?

* * *

[p. 36] A. Correct.

Q. Now assuming that to be true, you were saying that over the spread of the lists you think that there is in fact a difference in qualification between the people near the top and maybe the people near the bottom.

Would you believe, and I notice if you look in these lists, there are a lot of people lined up with the same test score; correct?

A. Correct.

Q. Would you say people who are 20 points apart are going to have a difference in ability in firefighting? Strike that.

Twenty points is a major difference in these exams; is it not?

MR. SCHRIDER: Objection. Are you asking her to give testimony based on the results of the validity study, or just her view?

MR. WYLER: This is her view as the person who oversees the recruitment process.

A. I don't know if I could say that. The written testing is such a small part of it, just because you got 20 points lower on the written test, [p. 37] you might be the best at the physical ability or more proficient at other aspects of the job.

Q. But you stated earlier, in your earlier testimony that you thought that there would be a difference between those ranked near the top of the list and those, say, a hundred down on the list?

A. There is a difference in proficiency on the written test. If I got 95 and you got 96 that wouldn't be indicative that you were smarter than I at this part of the test.

Q. If you got 95 and I got 83?

A. I would show more proficiency on this component of the test, yes, I would say that.

Q. Is it not correct, with the exception of the City's interpretation of the consent decree, the Ohio Revised Code would still require the City to hire off a single list by relative excellence based on the written exam; is that correct?

MR. VOLLMAN: Objection. What the code requires.

A. No, it wouldn't.

Q. It wouldn't?

A. We could have an oral component to that, it would not be just a written test. Or we could choose to give points for the physical ability test or

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

TILFORD YOUNGBLOOD, *et al.*, Plaintiffs, vs. JOHN DALZELL, *et al.*, Defendants.	:	Civil Action No. 8774 : Judge Rubin : DECLARATION OF CHARLES J. CRANNY

Charles J. Cranny deposes and says:

1. I am Professor of Industrial Psychology and Chair of the Psychology Department at Bowling Green State University in Bowling Green, Ohio.

2. I reside at 605 Pasteur, Bowling Green, Ohio.

3. I am an Industrial Psychologist and have a Doctorate in Psychology from Iowa State University and Psychologist License No. 950 from the State of Ohio.

4. I have written on employment issues and am familiar with and regularly use statistical methods in my teaching, research and consulting.

5. The courses I teach at Bowling Green State University include Personnel Selection; Statistics; and Statistical Analysis of EEO Issues at both the undergraduate and graduate levels.

6. I have served as a consultant and expert witness in both statistics and industrial psychology for a number of both plaintiffs and defendants in cases involving various forms of race or sex discrimination in employment.

Clients and cases are listed in my vita which is attached as Appendix 1.

7. At the request of plaintiff's counsel, I have done a review and analysis of various aspects of the hiring practices for firefighters in the City of Cincinnati. My review and analysis included both the 1988 and 1989-90 selection processes.

8. *1988 testing, selection and hiring – adverse impact analysis.* Table 3 (attached) shows that statistical test of the effects of the Background Investigation Component. As the Table shows, the proportions of white and black applicants who passed this component were .49 and .30, respectively. The Adverse Impact Ratio (A.I.R.) is the "rule of thumb" used by federal agencies as evidence of adverse impact. An A.I.R. of less than .80 is regarded as evidence of adverse impact (Section 4.D., Uniform Guidelines on Employee Selection Procedures (1978); 43 FR 38297 (August 25, 1978). The A.I.R. here if .62. In addition, a test of the statistical significance of the difference between the selection rates for the two groups indicates that the probability that the difference could be attributed to chance is less than one in one hundred.

Table 4 shows the same analysis for the results of the Written Examination. As noted on the table, "pass" refers here to those who passed the Written Examination and continued in the selection process; "fail" refers here to those who failed plus those in the Reserve category (i.e., those who did *not* continue in the process). The proportion of black applicants passing is .23. The proportion of non-black applicants passing is .66. The A.I.R. is .35, and the probability that the difference between the selection

rates could be attributed to chance is less than one in one million.

9. *1989 testing, selection and hiring – adverse impact analysis.* Table 5 (attached) shows the distributions of Written Scores for white, black, and other applicants, respectively. Figure 1 is a graphical depiction of these same data comparing white and black applicants' scores. As these data show, when the two groups of scores are compared, the scores of the black group are lower than those of the white group. In fact, only about 13% of the black scores exceed the median (50th Centile) of the white scores and fewer than 11% of the white scores fall below the median of the black scores.

Tables 6, 7, and 8 show statistical analyses of the effects of each of three different cut scores (minimum passing scores) on the Written Test. The cut scores illustrated in the three tables are 70, 80, and 90, respectively. In the tables, the column headed "S.R." shows the proportions who would pass with each of these cut scores. In each case, the A.I.R.s are well below .80. In addition, the tests of the statistical significance of the difference between the resulting selection rates for the two groups indicate that the probability that any of these differences could be attributed to chance is less than one in one million.

Taken together, Tables 5, 6, 7, and 8 are Figure 1 demonstrate that the use of any single cut score (minimum passing score) on the Written Test would have a clear adverse impact on black applicants.

10. *Validation of written test.* I have read the answers to Interrogatories No. 4, 5 and 6 of *Intervenors' Interrogatories to City Defendants.* . . .

The response to Interrogatory No. 4 indicates that the use of the test is based on content validity. Whether or not evidence exists for the content validity of the written test, such evidence does not address the question of whether higher scores on the test are associated with higher levels of performance on the job. In order to justify ranking on the basis of test scores, it would be necessary not only to demonstrate that the content of the test is closely related to the content of important aspects of job performance, but to demonstrate in addition that the test scores exhibited sufficient measurement reliability and were linearly related to job performance throughout the range of scores in which distinctions were made.

The response to Interrogatory No. 5 indicates that the personnel department has performed no study which would provide a justification of ranking applicants on the basis of test scores.

The answer to Interrogatory No 6. indicates that a study justifying ranking applicants on the basis of written test scores could not be done. The first sentence of that answer claims that since the selection process consists of several components, " . . . it would be impossible to ascertain whether the written test alone is predictive of a significant difference in the job performance of a firefighter".

This claim is false. Written test scores of all applicants are available. Some measure of job performance could be obtained for those hired. Written test scores

could then be compared with scores on the performance measure for those hired (and a validity coefficient computed). The procedure and the statistics involved are well known and widely published. It is a straightforward predictive validity problem, probably involving a correction for range restriction. Anyone qualified to evaluate the validity of a selection procedure should regard it as routine. The presence of other components is irrelevant as long as written test scores are available in a form unaffected by the other components. This last statement is true regardless of the validation approach used.

The second sentence of the response to Interrogatory No. 6 is not responsive to the question. A test based on so-called "content validity" should, indeed, predict entry-level performance. If the 13 week training program covering "all aspects of job performance" is completed before recruits perform as firefighters, the test *should* measure skills and knowledge required for performance but *not* covered by the training program. If the skills and knowledge tested for are included in the training program, the test is unnecessary and inappropriate. Alternatively, if the test is intended to select people with specific skills and knowledge, it is unnecessary to deal with such skills and knowledge in training.

If "entry level" is prior to the training program, the test should predict relevant performance at that point, and the presence of a (later) training program is irrelevant to the determination of the validity of that prediction. If "entry level" refers to a period subsequent to the training program, then there should be no overlap between the skills and knowledge "determined" by the

test and those which the training provides. It is inappropriate to reject those who lack particular knowledge when a training program will make it available when it is needed. This is particularly true when minority group members show disproportionate rates of rejection.

The form of validity evidence relied on here ("content validity") is inappropriate for any claim that might be made that the test determines skills and knowledge required for success in the training program. Such a claim would require comparison of test scores and a measure of performance in training in the manner described above.

If the skills and knowledge involved in the test are different from those involved in the training program, the presence of the training program has no effect on the ability to determine whether the test is predictive of relevant performance.

If the differences in performance related to test scores are claimed to be altered or eliminated by the results of the training program, the use of the test for selection would be inappropriate. In that case, the skills and knowledge that the test is designed to determine would have no effect on, or relationship to, relevant performance differences.

The *Standards for Educational and Psychological Testing* (APA et al., 1985), in the chapter concerned with employment testing, contain relevant material at Standard 10.4. They state that the content domain (i.e., those aspects of job performance which the test is designed to predict) " . . . should be described by characteristics that (a) can be

represented in test content, (b) will not change substantially over a specified period of time, and (c) the applicant should possess when being considered for employment".

In summary, evidence which may be sufficient to establish the content validity of a measure or selection procedure is not necessarily sufficient to establish a justification for ranking applicants on the basis of test scores. Evidence relevant to the question of whether differences in test scores are related to differences in level of firefighter performance can be gathered regardless of whether or not there are other components in the selection process. The presence of other components is irrelevant to such an investigation both for evidence gathered by a predictive validation strategy and when such evidence is obtained from an appropriate comparison of test content and job performance content. The presence of a training program whould [sic] also be irrelevant to the determination of whether the written test alone is predictive of a significant difference in the job performance of a firefighter.

I assert that the foregoing is true, under penalty of perjury.

/s/ Charles J. Cranny
Charles J. Cranny
Executed on January 30, 1991

Table 3. Test of 1988 Background Investigation Component

	Fail	Pass	Total	S.R.
White	55	52	107	.49
Black	89	39	128	.30
Total	144	91	235	

A.I.R. = .30/.49 = .62
Chi-square = 7.33
Z = 2.71 ($p < .01$)

Data Source: 1988 "disqualification letters" and telephone conversations with John Schrider, Esq., 10/24/88

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.

Table 4. Test of Results of Written Examination 1988

	Fail*	Pass*	Total	S.R.
Black	761	230	991	.23
Other	432	856	1288	.66
Total	1193	1086	2279	

A.I.R. = .23/.66 = .35
Chi-square = 418.27
Z = 20.45 ($p < .000001$)

Data Source: Computer Printout of 1988 Written Test results.

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education.* New York: McGraw-Hill.

*Pass = Passed and continued in process.

Fail = Failed and Reserve.

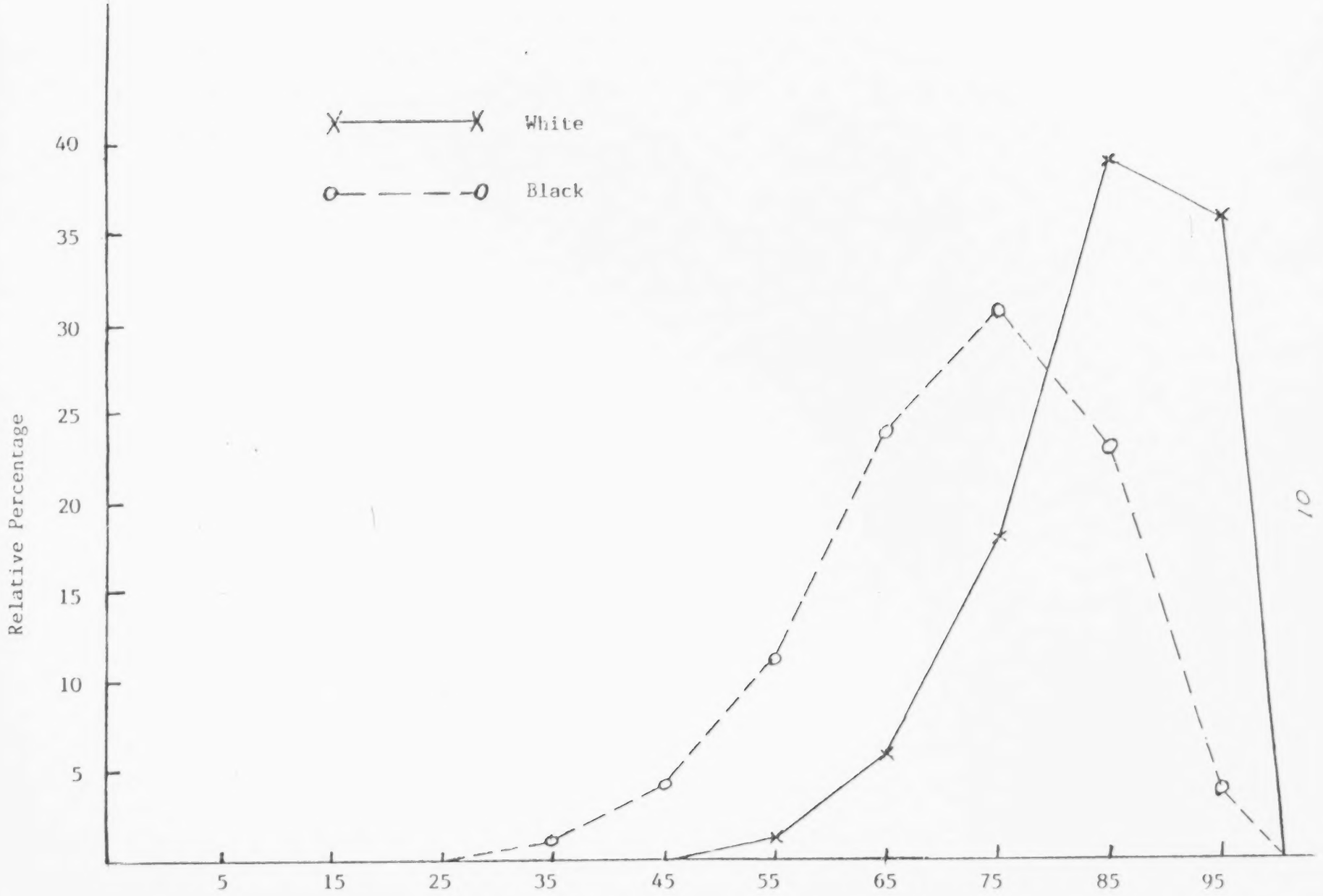

Figure 1. Written Score Distributions by roll.
(Score range midpoints)

Table 5. Test Scores (% Correct) by Race

Score	WHITE N	WHITE Rel. %	WHITE Cum. N	WHITE Cum. %	BLACK N	BLACK Rel. %	BLACK Cum. N	BLACK Cum. %	OTHER N
90-100	399	36	1095	100	30	4	683	100	2
80-89	426	39	696	64	154	23	653	95	3
70-79	192	18	270	25	214	31	499	72	5
60-69	61	6	78	7	166	24	285	41	4
50-59	14	1	17	1	82	12	119	17	1
40-49	1	-	3	-	29	4	37	5	0
30-39	1	-	2	-	8	1	8	1	0
20-29	0	-	1	-	0	-	0	-	0
10-19	0	-	1	-	0	-	0	-	0
0-9	1	-	1	-	0	-	0	-	0
N	1095				683				15
est.Mdn.	86.0				72.1				77.0

Notes:

n	=	number of scores in that score range
rel. %	=	percentage of scores for that racial group which fall in that score range
cum. n	=	number of scores below upper limit of that score range
cum. %	=	percentage of scores below upper limit of that score range
est.Mdn.	=	Median (50th Centile) estimated from these data

Source:

Computer printout of I.D. numbers and scores titled "Listing in Ascending Order of ID's, Fire Recruit" and untitled printout of ID's and scores with racial group identification.

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Table 6. Statistical Test of Written Scores with Cut Score = 70

	Fail	Pass	Total	S.R.
White	78	1017	1095	.929
Black	285	398	683	.583
TOTAL	363	1415	1778	

A.I.R. = .583/.929 = .63
Chi-square = 307.88
Z = 17.55 (P < .000001)

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.

Table 7. Statistical Test of Written Scores with Cut Score = 80

	Fail	Pass	Total	S.R.
White	270	825	1095	.753
Black	499	184	683	.269
TOTAL	769	1009	1778	

A.I.R. = .269/.753 = .36
Chi-square = 399.53
Z = 19.99 (P < .000001)

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.

Table 8. Statistical Test of Written Scores with Cut Score = 90

	Fail	Pass	Total	S.R.
White	696	399	1095	.364
Black	653	30	683	.044
TOTAL	1349	429	1778	

A.I.R. = .044/.364 = .12
Chi-square = 234.22
Z = 15.30 (P < .000001)

Reference: Guilford, J.P. and Fruchter, B. (5th ed.) (1973) *Fundamental Statistics in Psychology and Education*. New York: McGraw-Hill.